IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.639 OF 1994

Laxman Vithal Khirade
age 30 years, Occupation
Watchman, residing at
Survey No.74, Bombelwale Chawk,
Sayyednagar, Hadapser, Pune. .. Appellant
(Org.Accused)

Vs.

The State of Maharashtra .. Respondent

Mr. Nitin Jamdar for the appellant.
Mr. V.B. Konde-Deshmukh, APP for Respondent-State.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : December 10, 2004.

ORAL JUDGMENT: (PER S.S. PARKAR,J.):

1. This appeal is filed challenging the Judgment and Order dated 22/9/1994 delivered by the II Additional Sessions Judge, Pune convicting the appellant for the offence of murder of his own wife and sentencing him to RI for life and to pay a fine of Rs.300/- in default to suffer RI for nine months in Sessions Case No.119 of 1994.

2. The prosecution case briefly narrated is as under:-

. The incident of assault took place on the night of 13/1/1994 in the house of the accused at

about 9 p.m. immediately after the dinner. On the night of the incident there was Pooja in the house of the accused. Deceased Kamal, her father, her brother Sudhakar and one Sunil Waikar, the friend, took dinner. Complainant Sanjay PW 3, the brother of deceased Kamal, had come to the house when others were taking dinner. He did not join others for dinner because he had to take bath. After taking the dinner Kamal's father, brother and friend Sunil Waikar went outside the room and were gossiping there. The accused had some talk with his wife Kamal and he picked up kitchen knife and raised his hand to assault his wife Kamal. Complainant Sanjay rushed to rescue Kamal but accused pushed him back and assaulted Kamal on the right side of her neck. Hearing the cry of Kamal, her brother Sudhakar, father and Sunil Waikar went inside the room while the accused ran away from the house. Complainant Sanjay told his father, brother and Sunil Waikar that accused assaulted Kamal. She was taken to Sane Guruji Hospital by Sudhakar, her father and Sunil Waikar where she was given first aid and the doctor advised to take her to the Sassoon Hospital because of the profuse bleeding. She was thereafter removed to KEM hospital in Pune itself where initially PW 4 Dr. Rajesh Walvekar attended to her and on seeing the serious condition and continuous

bleeding of the patient, he called senior doctor Mrs. Mehru Mehta PW 6. She advised immediate operation and, therefore, Kamal was taken to the operation theatre, where she died succumbing to her injury. Message was already given to the police station from the said hospital about the injured patient and, therefore, police had arrived in that hospital when Kamal was still in the operation theatre. After some time the police were told about the death of Kamal. Police recorded the complaint (FIR) of PW 3 Sanjay Sindhankar, who is the brother of Kamal and is an eye witness to the incident. His complaint is at Exh.21 which was recorded on that night before 3 a.m. Thereafter crime was registered for offence of murder against the accused. The police had gone out in search of the accused. Accused was arrested by 5.30 a.m. in the morning from the house of his mother which is situated about 150 metres from the house of the deceased where she was assaulted. The clothes of the accused were also seized under panchanama. His shirt was having blood stains. Inquest panchanama Exh.13 was drawn. In the morning spot panchanama Exh.15 was drawn. The statements of the witnesses were recorded. After the arrest of the accused, while in custody, he made statement and volunteered to produce the knife from the place where he had thrown

it. At his instance blood stained kitchen knife was recovered from the bushes from near the house where the incident had taken place. Post mortem on the dead body was performed. Blood stained clothes of the deceased also were attached and seized under panchanama. The clothes of the deceased as well as the accused and other muddemal articles, including kitchen knife (Article 10) were sent to the office of C.A. for examination. As per the report of the C.A. Exh.10 blood of group "A" was found on the shirt of the accused as well as the clothes of the deceased and the knife produced at the instance of the accused. The blood sample of the accused was also taken and sent to the office of C.A. and as per the C.A. report Exh.11 his blood group was "B". After completion of the investigation, charge-sheet was filed and the case was committed to the Sessions Court.

3. Before the Sessions Court, charge was framed against the accused for offence of murder under Section 302 of IPC, to which he pleaded not guilty. On behalf of the prosecution 11 witnesses were examined. The complainant Sanjay Sindhankar who is the brother of the deceased and was an eye witness to the incident has been examined as PW 3. The other

important witness is Sunil Waikar, the friend of the deceased and PW 3 Sanjay who was present in the house of the deceased on the night of the incident. He has been examined as PW 9. Prosecution has examined four medical officers. Dr. Sanjay Divakar, who attended the patient in the Sane Guruji Hospital, has been examined as PW 7. Dr. Rajesh Walwekar, who first attended the patient in the KEM Hospital, Pune has been examined as PW 4, while the senior doctor from the KEM Hospital, Pune Dr. Mrs. Mehru Mehta has been examined as PW 6. Dr. Laxmikant Bade, attached to Sassoon Hospital, Pune, who conducted post mortem on the dead body has been examined as PW 5. PW 1 is Arun Dhere, who had acted as panch for the spot panchanama Exh.15, while PW 2 is Bandu Pardeshi, who had acted as panch for the seizure of the clothes of the accused under panchanama Exh.18. PW 8 is Baban Tupe, who had acted as panch for the recovery of knife at the instance of the accused under panchanama Exh.32. PW 10 is Vijay Dalvi, the Administrative Officer who had investigated the case. Lastly, prosecution has examined PSI Abaji Ahivale as PW 11, who recorded FIR and registered the crime. The defence of the accused was of total denial and false implication. As per his statement under Section 313 he was not present at the time of the incident. In the early morning at about 5

a.m. he learnt that his wife fell down and received injuries and police arrested him.

4. After considering the entire evidence on record, the trial judge by his impugned judgment and order dated 22/9/1994 convicted the appellant-accused for offence under Section 302 of IPC and sentenced him as aforesaid, which is under challenge in this appeal.

5. Mr. Jamdar the learned advocate appearing for the appellant-accused, firstly, contended that there are omissions and contradictions in the evidence of complainant Sanjay PW 3 and PW 9 Sunil Waikar, the friend, who was present on that night of the incident and, therefore, the evidence of the complainant should not be believed. He also argued that because Sanjay PW 3 was staying with the couple and was not working, the accused used to ask him to work and to stay somewhere else and, therefore, Sanjay PW 3 had grudge against the appellant and, therefore, he falsely implicated him. He then contended that in the history of the injury allegedly given by the patient to Dr. Walvekar PW 4 it was stated that it was a case of accident and the court should accept the said history recorded by the doctor for acquitting the accused. Thirdly, he contended that prosecution has not

examined important witnesses like the daughters of the deceased and the other brother of the deceased and therefore, adverse inference should be drawn. Lastly, he contended that since the prosecution case is of single stab injury it could be a case of 304 Part II of IPC.

6. So far as the injury of deceased Kamal is concerned, Dr. Divakar (PW 9), who was Resident Medical Officer of Sane Guruji Hospital, has deposed that he saw a wound on the neck from which the blood was oozing and then he dressed the wound and advised to take the patient to the Sassoon Hospital. PW 4 Dr. Rajesh Walvekar, who was the medical officer, attached to KEM Hospital, Pune has stated that the patient was brought to the hospital at about 11.15 p.m. On examination he found following injury:-

> 1. There was a deep penetrating injury - on the right lower neck, that was just above the Clavicle bone, the depth was 7 to 8 cm. The length was 2 to 2 cm and breadth about 1/2 cm.

7. Dr. Walvekar PW 4 has deposed that injury was profusely bleeding and the patient was in a shock. He consulted senior doctor and then it was decided to

operate the patient and, therefore, gave six bottles of blood to the patient. Then there is evidence of senior doctor Mrs. Mehru Mehta PW 6 from KEM Hospital, Pune. She deposed that the patient was straight way taken to the operation theatre from the casualty department because patient was bleeding very profusely. According to her there was wound on the neck from which the blood was oozing. The condition of the patient was critical and the Assistant doctor put his thumb on the wound with a view to prevent the bleeding. According to her they found the main artery and vein to the arm was cut and though both the artery and vein were tied at both ends, the heart of the patient had stopped. But with a cardiac massage and ventilations, the heart was revived and the patient was taken to recovery room. Thereafter patient had cardiac arrest. All efforts to resuscitate were made and efforts continued for atleast half an hour. All this time, her pupils remained dilated which is a sign of brain death. Thereafter patient was declared dead. Lastly, Dr. Bade PW 5, who conducted post mortem examination on the dead body, noticed following injuries on external examination:-

1. Surgical wound of venesection medial malleolus right leg.

2. Surgical wound of inter costal drain, rubber tube 4 1/2 below right axilla - Rubber tube present.

3. Stitched incised wound - 3/4" in length, 3" below right ear and tow and 1/2" from midline of neck 1/4" above lateral end of Injury No.4. Muscle deep with one stitch.

4. Stitched wound - 1 1/2" right lateral to sternal notch on right side of neck measuring 4" in length with 12 stitches oblique in direction.

. On internal examination he found following injuries:-

1. Sutured sub-clavical artery, vein along with few muscle fibree at places, upper and lower end seperated.

2. Stab injury on pleurs and right lung upper lobe through and through, wound of entry measuring 3/4" in length and breadth 1/4" wound of exit on lower surface of upper lobe measuring 3/4" X 1/4" wound of entry sutured.

3. Stab injury on upper surface of lower lobe of lung measuring 3/4" x 1/4" x 1/2".

4. Clean cut fracture of right color bone in middle Surgical.

8. The cause of death was given as shock due to stab injury. According to this doctor external and internal injuries were sufficient in the ordinary course of nature to cause death. He has deposed that the injury of Kamal was possible by the weapon knife

(Article 10) which was shown to him. According to him in view of the injury to the lung, upper bone through and through and superior surface of lower lobe, sufficient force would be required to cause those injuries, though suddenly. This he has deposed inspite of the fact that when the dead body was brought to his hospital, the history was of fall in the house.

9. From the medical evidence no doubt it is proved that deceased had suffered homicidal death because of the injury caused to her with knife. The injury which was incised wound and which was also described as stab injury was possible with an assault by a knife like article no.10 which was made by the accused and, therefore, also corroborates the ocular evidence that accused had assaulted the deceased on her neck with kitchen knife article no.10.

10. However, relying on the history of injury recorded in the KEM hospital and also at Sane Guruji Hospital, it was vehemently contended on behalf of the defence that it was an accidental death. As per the evidence of Dr. Divakar (PW 7) who was attached to Sane Guruji Hospital in Pune, the brother of the patient told him that patient had received injury due

to fall on iron cupboard. The said doctor had brought original register and had produced the extract of the register in his own hand writing under his signature at Exhs. 29 and 30. In Exh.30 the history has been mentioned as due to fall of the cupboard. A little below in column no.F, it is mentioned that "Brother not giving proper history". The injury is described as follows:-

> "Deep incised wound on neck near medial end of R clavicle."

. There is also mention of "Profuse Bleeding". In the other column it has been mentioned "semiconscious, Pupils constricted not reacting. Mild froth to mouth - Dressing done - Ref. to Sassoon.

11. From the above extract Exh.30 it is clear that there was deep incised wound on the neck of the patient and there was profused bleeding. It is further clear that patient was semiconscious and her pupils were not reacting. There was also froth coming from the mouth and, therefore, the patient must not be in a position to give history. Doctor has deposed

that the history given due to fall of cupboard has been given by the brother. The remark on the aforesaid extract is important that "Brother not giving proper history". This means that according to the said doctor the history of injury due to the fall of the cupboard was not correct. In other words an injury received by the patient could not have been caused by the fall of the cupboard. Reliance is mainly placed on behalf of the defence on the evidence of PW 4 Dr. Walvekar, attached to KEM Hospital, Pune. He appears to be a very junior doctor who was 26 years old at the time of giving evidence in this case. He has deposed in the cross-examination that he had taken the history of the patient personally and at the time of taking the history the patient was conscious and well oriented. According to him the patient gave the history of "accidental, penetrating injury due to nail due to fall while putting on bulb around 9.00 p.m.". From the nature of the injury and the condition of the patient it does not appear that the patient was in a position to give history of the injury. He has produced on record the extracts of the case papers from the KEM hospital which are Exh.24. Perusal of the said case papers show that on page 5 thereof, in the date column, the date given is 13/1/1994 at 11.15 p.m. when the patient was admitted. Name of the

patient was shown as Khirade K.L. History of injury mentioned on that page is as follows:-

> " penetrating injury on the Rt. side of the neck."

. It is further stated that on admission she was in profound shock with impalpable peripheral pulses. Inspite of giving her haemacceal 1 lit + 1 0 BT her condition deteriorated. Thereafter there is mention that Dr. Mrs. Mehta was informed and she came within 10 minutes. He further stated that there was massive haemorrhage controlled throughout the transit from casualty to OT by strong finger pressure. Patient became unconscious in the OT. It is pertinent to note that on that sheet there is no mention as to how the injury was caused. The one more sheet of the similar type is produced in the identical hand writing at page 8, in which patient’s name was mentioned as Khirade Kamal. The date and time given is same i.e. 13/1/1994 at 11.15 p.m. Here the history was mentioned as follows:-

> "History given by patient herself. History

> taken by Dr. Walvekar. Alleged H/O accidental penetrating injury due to nail due to fall while putting on bulb at around 9.00 p.m."

. The condition of the patient was mentioned as follows:-

> "O/E - peripheral pulses not palpable - BP not recordable, patient in shock - conscious patient well oriented".

12. It is pertinent to note that this doctor had produced two extracts both recorded on the same date and same time in respect of the same patient. On one page i.e. at page no.5 there is no mention about the history given by the patient nor it mentions as to the manner in which injury was caused. While on the said page no.5 it is mentioned that on admission patient was in profound shock with impalpable peripheral pulses and inspite of some treatment her condition deteriorated, but in another sheet i.e. at page 8 of those case papers it is mentioned that patient was conscious and well oriented. In our view this undoubtedly shows that this young and inexperienced doctor who was hardly 26 years old not at the time of the admission of the patient but at the time of giving

evidence in the court had tried to oblige the accused by preparing new sheet at page no.8 which is different from the earlier sheet at page no.5 which must be originally prepared. In this new sheet it has been specifically mentioned that the history was given by the patient herself and history taken by Dr. Walvekar which is not found in the earlier sheet prepared on the same date and time immediately on the admission of the patient. There was no necessity for this doctor to write as history taken by Dr. Walvekar. If Dr. Walvekar had noted down history in his own hand writing it was not necessary to mention it as history taken by Dr. Walvekar. In several such medical case papers which are produced before the courts and perused by us, we had never found the doctor mentioning in the history sheet as to which doctor had taken the history. Moreover, while on the earlier sheet, there is mention that the patient was in profound shock with impalpable peripheral pulses and her condition deteriorated, which undoubtedly creates impression that the patient must not be in a position to give history, in the new sheet the doctor writes that the patient was conscious and well oriented. It is, therefore, clear that this improvement was made by the said doctor subsequently with a view to favour and oblige the accused.

13. In his examination-in-chielf also Dr. Walvekar has deposed that injury was profusely bleeding and the patient was in shock and he started giving medical treatment. He has further stated that he immediately consulted senior Dr. Mrs. Mehta who came immediately to casualty ward and after consulting her it was decided to operate the patient. He further states that the patient was given six bottles of blood and she was taken to the operation theatre. In the operation theatre, doctor tried to stop the bleeding and the patient got cardiac arrest and she died. He has also deposed that the injuries could be possible with the weapon like knife (Article No.10) and that type of injury was not possible if the person falls on a cupboard. From the evidence of the above four doctors and the initial remarks made by this very doctor PW 4 in the case papers, it is clear that there was assault on the deceased with a knife and she had received homicidal death. From the nature of injury or injuries and the fact that there was injury to the lung there can be no doubt that the injury must have been caused by use of knife article no.10 as stated by the complainant, an eye witness to the incident and the history recorded by Dr. Walvekar PW 4 is palpably false. In any way, it is inconsistent with the injury

and the medical papers as well as evidence of different senior medical officers examined on behalf of the prosecution.

14. The tendency on the part of this doctor (PW 4) to show favour to the accused is also obvious from the tenor of his deposition which is contrary to the deposition of other three more senior doctors who have been examined on behalf of the prosecution and is also inconsistent with the case papers initially prepared by him in KEM Hospital and his deposition in his examination-in-chief. For the first time in the cross-examination he states that he had taken the history of the patient personally and at the time of taking history, the patient was conscious and well oriented and it was the patient who gave the history of accidental penetrating injury due to nail due to fall while putting on bulb around 9.00 p.m. Apart from the fact that from the record, medical papers and the evidence of Dr.Divakar (PW 7) of Sane Guruji Hospital it is quite clear that patient must be unconscious and not in a position to say anything as to the cause of injury, even the case paper written by this very doctor (PW 4) on page 5 of the medical papers produced by him shows that the patient was in profound shock with impalpable peripheral pulses and

her condition had deteriorated and the patient had become unconscious in the operation theatre. It is pertinent to note that while in the case papers of Sane Guruji Hospital the history is mentioned as due to fall of cupboard, this doctor on the subsequent page no.8 gives the history as being given by the patient herself that it was accidental penetrating injury due to nail due to fall while putting on bulb around 9.00 p.m.

15. Firstly, it is difficult to accept this version of this doctor because the patient with such profused bleeding due to neck injury, when the artery and vein were cut, could not have been in a position to give the history. Secondly, this history has been written not on the very first page on the admission of the patient but on the subsequent page. Thirdly, earlier when the patient was immediately taken to Sane Guruji Hospital the history was given by the brother at about 9 p.m. but at 11.15 p.m. i.e. about more than two hours after the incident when the lady is taken to KEM Hospital, Pune she is shown to have herself given the history of injury which does not at all appear to be possible in view of the serious injury and profused bleeding. The doctor of Sane Guruji Hospital has stated that when she was admitted

to that hospital she was semiconscious. Fourthly, the addition has been made in the KEM Hospital giving history that the injury was caused due to nail due to fall while putting bulb around 9.00 p.m. without any reference to the fall of the cupboard as recorded in Sane Guruji Hospital. This must have been entered subsequently by the doctor (PW 4) because he must have felt that due to the fall of the cupboard the lady could not have got incised wound on her neck which resulted into cutting of the artery and vein to the neck. The desire on the part of this doctor (PW 4) to favour the accused is also reflected in his further deposition in the cross-examination when he states that the injury could be possible if the person falls on the portion which is sharp, pointed, fitted to the cupboard. He has further stated that generally uncrossed match blood may result into death and in this case particularly uncrossed match blood was given to the patient when the case papers of that hospital show that six bottles of blood transmitted in the body of the patient was "A" positive and the C.A. report also shows that the blood on her clothes was of "A" group. Thus, this medical officer has obviously made a false statement on oath in his deposition with a view to favour and oblige the accused.

16. Next, it is important to point out that in the spot panchanama there is nothing to show that there was any nail or pointed object in the Godrej cupboard which was made of iron wherein no nail could have been fixed. Secondly, the spot panchanama also shows that the bulb was in the middle portion of that room and the cupboard was about 3 to 4 ft. at a distance from that room and, therefore, also a person falling while putting on bulb would not have been injured due to his/her dashing against the cupboard having nail. Moreover, it is pertinent to note that when there were other four male members in that room at the relevant time where was the necessity for a lady to attempt to put on bulb. The intention of this doctor to favour the accused is further reflected in his deposition when he stated at the end of para 4 that he agreed with the suggestion put to him that wounds of the large veins, especially of the neck, chest, axilla or groin, may result in death from the air entering the blood and consequently passing into the right side of the heart.

17. As against the aforesaid evidence of this inexperienced junior doctor, there is evidence of Dr.Mrs. Mehta, senior doctor from the KEM Hospital, Pune who was summoned immediately by doctor Walvekar

(PW 4) on seeing the patient bleeding profusely. According to Dr. Walvekar himself she had come within 10 minutes. She is examined as PW 6. She has herself deposed that she came immediately after admission of the patient in casualty and the patient was taken straight way from casualty to operation theatre because she was bleeding profusely from the neck and the Asstt. doctor had to put thumb on the wound in an effort to prevent the bleeding. She states that in operation theatre the patient's condition was very critical and with the pressure on the wound, the inner part of the collar bone was removed and it was found that the main artery and vein to the arm was cut. She further deposed that in order to save her life both the arteries and veins were tied at both the ends. However, patient's heart stopped and with the cardiac massage and ventilations the heart was revived and patient was taken to recovery room. There again patient had cardiac arrest and inspite of the effort made for half an hour to resuscitate her, she died. She has further deposed that all the time the pupils of the patient remained dilated which was a sign of brain death. As per the evidence of this doctor (PW 6) who was senior most doctor, who on being summoned, had come within ten minutes of the admission of the patient in the casualty ward of the KEM hospital, Pune

as deposed by Dr.Walvekar himself, she had found the patient in critical condition and therefore the patient could not have given the history of the injury in the manner as deposed to by Dr. Walvekar (PW 4).

18. Then we have the evidence of Dr. Bade PW 5 who had conducted post mortem examination. He has given the cause of death as a result of stab injury and the injury was possible with weapon like knife (article no.10). He has emphatically stated in his deposition that if the uncrossed match blood is given to the patient instant death is not possible. He has further deposed that the injuries found on the person of the deceased were not possible if a person falls forcibly on the nail or iron weapon. He has further stated that it is not true to suggest that such injuries were possible due to fall on the nail or weapon. He has also emphatically stated that it is not true to suggest that his opinion that the injuries (of the deceased) were not possible by fall is incorrect. He has further stated that if uncrossed match blood is given to the patient then death may occur except blood group "O".

19. Realising that history of injury was noted subsequently on subsequent pages, the defence advocate

contended that it was possible, though the patient may be unconscious at the time of admission, that her condition might have improved after some time. That does not appear to be so. The case papers of KEM Hospital, Pune show that the condition of the patient was continuously deteriorating as deposed to by PW 6 senior Dr. Mrs. Mehta. She has stated that in the operation theatre patient's condition was very critical and though both the artery and vein were tied on both ends her heart stopped and efforts were made for half an hour to revive her, her pupils remained dilated which was a sign of brain death. Even the case papers of the Sane Guruji Hospital, where the patient was taken first, show that patient was semiconscious, pupils had constricted and were not reacting and there was mild froth in the mouth.

20. No doubt in the case papers of Sane Guruji Hospital Dr. Divakar has noted the history as due to fall of cupboard but he himself has remarked in the case papers that that history could not be correct considering the injury suffered by the lady which was a cut injury which must have been caused by use of sharp weapon like knife. In the case papers itself he has stated that the brother had not given proper history. It is possible that Sudhakar, the other

brother of Kamal who had accompanied the patient to that hospital might have told the doctor so. But that must be with a view to save the marriage to see that the accused was not arrested. Cases are not rare where some times even wives give false history of accidental burn injuries. Expecting that the injury is not fatal wife on such occasions is vitally concerned to ensure that marriage is not broken in case the lady survives. Because if the husband is taken into custody on the complaint against him marriage would be broken. If the history of the assault by the accused had been given by the brother in the hospital, the hospital authority would have immediately informed the police in which case the police would have taken further steps including arresting of the assailant. In the KEM Hospital it seems that initially no history was recorded at all but it had been falsely recorded subsequently by the junior doctor by inserting history on subsequent page with a view to favour the accused before the medical papers were produced in the court.

21. In view of the above, the argument advanced on behalf of the defence that benefit should be given to the accused due to the history of injury recorded by the KEM Hospital cannot be accepted. His argument is

that on the basis of history given by the patient to the doctor on the admission to the hospital it is treated as dying declaration on the basis of which the accused may be convicted and in this case when the history is otherwise favourable to the accused benefit should be given to him and he should not be convicted. As we have pointed out hereinabove that the medical record shows that the patient was not in a position to give any history and the same undoubtedly seems to have been inserted by Dr. Walvekar subsequently with a view to oblige and favour the accused as it is not mentioned in the very first page where the condition of the patient was shown to be critical and he had to prepare this false record on subsequent page, obviously with a view to favour the accused. If the said history cannot be believed to be true for the reasons discussed above the whole edifice of the argument of the defence advocate built on it cannot stand.

22. The next contention raised on behalf of the accused is that there are omissions and contradictions in the evidence of complainant Sanjay PW 3 and Sunil Waikar PW 9. Though there were other members of the family, including these two witnesses, present in the house at the time of incident it is only Sanjay PW 3

who had seen the assault as he was at the relevant time in the same room taking bath. The tenement consists of only one room in which the food is also cooked and open mori is provided for taking bath. Deceased herself, her father, other brother Sudhakar and PW 9 Waikar had taken meals in the night. After the meals father, brother and PW 9 Waikwar went out of the room and were gossiping as Sanjay had to take bath. Accused also had taken meals that time along with other members. When these three persons went out accused had some talk with Kamal and then he picked up a kitchen knife and slit her neck which caused bleeding injury. Immediately after the assault he left the house which was naturally seen by the three persons who were standing outside the house. Sanjay PW 3 has deposed that when accused picked up knife he rushed to rescue his sister but he was pushed by the accused and then he assaulted Kamal and thereafter he ran away. The fact that the accused was there in the house and took dinner along with the other members of the family is supported and corroborated by PW 9 Waikar who was the friend of Sanjay as well as deceased Kamal. He has also corroborated Sanjay when he deposed that immediately after the incident when they heard cry of Kamal accused ran away from the house. The other members of the family i.e. Kamal’s

father, brother and PW 9 Waikar who were at that time there could have given evidence stating that they had also seen the assault but that is not done, because at the relevant time it was only Sanjay who was in the open mori taking bath. The mori was an open mori and, therefore, he could have heard them and seen the assault. Prosecution has not tried to examine other relations to falsely depose that they had seen the actual assault. Even PW 9 who was examined has not done so.

23. Sanjay used to reside with his sister Kamal and the accused. He has stated that accused was annoyed with his wife because he had seen his wife coming on the motorcycle with witness Sunil Waikar PW 9, though he had not made complaint about it. Accused used to quarrel, abuse and beat his wife Kamal. Kamal was for some time serving in Darshan Industries where Sunil Waikar PW 9 was also serving and, therefore, PW 9 used to drop her on his motorcycle. He was also friend of complainant Sanjay. As at the relevant time Sanjay was in mori taking bath the other male members like father and brother of Kamal and witness Sunil Waikar took the injured to Sane Guruji Hospital, Pune. Thereafter on the advice of Dr. Divakar Kamal was taken to KEM Hospital in Pune. The learned defence

advocate has pointed out to us some omissions and contradictions in the evidence of two witnesses which are not on the vital points. While PW 3 Sanjay stated that accused came to the house at about 9 p.m. and all of a sudden started eating foot from the plate of his brother, PW 9 Sunil Waikar has stated that when he went to the house at 8.30 p.m., accused was already there. Mr. Jamdar also pointed out that there is omission in the complaint to state specifically that he was standing when the other members were taking meals. In our opinion such omissions cannot amount to contradictions because they did not relate to the offence in question. They were not even important enough to be included in the complaint which was filed at about 3 a.m. on that night, immediately after Kamal had succumbed to her injury. No minor details are necessary to be given in F.I.R. The evidence of these two witnesses, therefore, cannot be disbelieved on the basis of such minor omissions.

24. It is also sought to argue that there is a discrepancy between PW 3 and PW 9 as to whether accused was at the relevant time staying with deceased or staying with his own mother but that discrepancy is bound to be there as PW 9 Waikar was not staying in the house and Sanjay PW 3 was the proper person to

depose about the same.

25. The next argument is that main witnesses have not been examined by the prosecution. It is argued that father and other brother of the deceased i.e. Sudhakar who were stated to be present at the time of the incident ought to have been examined. It is further argued that two young daughters of the deceased and the accused ought to have been examined. The statements of the aforesaid persons were recorded. If there had been anything in their statements favourable to the accused nothing had prevented the accused from examining those witnesses. Moreover, it is the prerogative of the prosecution to decide which witness should be examined and which need not be examined. There is no necessity of unnecessarily multiplying the number of wintesses. It is well settled that the court requires the quality of evidence rather than quantity of evidence. The father and other brother Sudhakar are the relatives of the deceased and they do not seem to have actually seen the assault on the deceased but heard her cry and saw accused running away from there. So far as the daughters are concerned they were stated to be hardly 6 and 3 years old, out of them one is said to have gone to sleep at that time. Even the six years' old

daughter was of tender age and when the evidence of Sanjay PW 3, the brother of the deceased, was available, there was absolutely no necessity of examining even six years old daughter of the deceased. As it is PW 9 Sunil Waikar was an independent witness who was examined on behalf of the prosecution. He had seen the accused leaving the house quickly after the incident when Kamal raised cry due to the assault by the accused. This is not a case of prosecution withholding material evidence from the court which could have helped to throw light on the case.

26. Apart from the aforesaid evidence, there are other circumstances which go against the accused. The accused was traced in the house of his mother which was about 100 metres away from his own house where the incident took place. He was apprehended at about 5-5.30 a.m. on that very night. He was wearing a shirt which was having blood stains which was attached under panchanama. After his arrest on that very night, there was recovery of knife made at his instance. Prosecution has led the evidence of panch Baban Tupe PW 8 in that respect, which is not demolished in his cross-examination. His evidence is also supported by the Investigating Officer PW 10 Vijay Dalvi, Administrative Officer. The knife was

produced from the bushes near and in front of the house of the accused. That knife was found stained with blood and was seized under panchanama Exh.32. Along with the clothes of the deceased, the shirt of the accused seized under panchanama Exh.18 and the knife (article 10) recovered at the instance of the accused under panchanama Exh.32 were sent to the office of C.A. for examination. As per the C.A. report Exh.10 the clothes of the deceased as well as full shirt of the accused were found stained with blood of group "A". As per the C.A. report the shirt was having few blood stains ranging from 0.1 to 3 cms in diameter spread at left front. As the blood stained clothes of the deceased were also found to have "A" group, it goes without saying that the accused was having blood on his shirt which was of the deceased which is not explained by him. Apart from the fact that he has not explained the blood found on his shirt, his own blood collected during the course of investigation and sent to the office of C.A. was of group "B" as per the C.A. report dated 31/3/1994 Exh.11. Even the blood of deceased was sent to the C.A. which was found to be of group "A" as per C.A. report Exh.12. Thus, though the accused was having blood group of "B", the blood found on his shirt is of group "A" which was that of the deceased. The accused

had not chosen to explain the finding of blood on his shirt, except by disowning the shirt as his own. Even the kitchen knife (article 10) which was recovered at the instance of the accused was sent to the office of C.A. and as per the C.A. report Exh.10 it was found stained with blood of group "A" which is that of the deceased. The finding of blood of the group of deceased on the shirt of the accused and the same blood group found on the knife (article 10) which was recovered at the instance of the accused, are strong circumstances which lend support to the case of the prosecution in establishing the guilt of the accused.

27. Thus, the prosecution has proved the motive against the accused and there is evidence of eye witness complainant Sanjay PW 3, the brother of the deceased, who had seen the actual assault. This is supported by the evidence of PW 9 Sunil Waikar who was at the relevant time present at the place of incident and had seen accused running away immediately after the assault on the deceased. Accused left immediately when Kamal raised cry. On inquiry by other relations present there Sanjay had told them that the accused had assaulted Kamal with knife. The circumstances of finding of blood of group "A" on the shirt of the accused and the knife (article 10) recovered under

Section 27 of the Evidence Act at the instance of the accused have also been proved which lend support to the prosecution case in establishing the guilt of the accused.

28. The reliance by Mr. Jamadar on the judgment of the Supreme Court in the case of Habeeb Mohammad vs. State of Hyderabad reported in **AIR 1954 SC 51** is of no assistance to the appellant. It is held in that case that it is the duty of the prosecution to examine a material witness, particularly when no allegation has been made that, if produced, he would not speak the truth. No adverse inference can be drawn against the prosecution case for non-production of a witness who is not a material witness. In this case, as observed earlier, the material witnesses have been examined by the prosecution and no material witness was left out. The reliance on the judgment of the Supreme Court in the case of Suresh vs. State of Madhya Pradesh reported in **AIR 1987 SC 860** is also of no assistance to the appellant. In the said case the accused was convicted on the basis of dying declaration of the deceased. The doctor had deposed that deceased was in her senses at the time of recording her statement and, therefore, it was held that the order of conviction cannot be interfered

with. So far as this case is concerned, we have pointed out that the deceased was not in a position to give any statement and the case papers show that on subsequent pages PW 4 Dr. Walvekar seems to have falsely mentioned about the alleged history given by the patient.

29. Lastly, it is contended on behalf of the appellant that this is a case of culpable homicide not amounting to murder. This argument is advanced on the basis of the evidence of complainant PW 3 that there was quarrel between the husband and wife. PW 3 has stated that when he was in mori accused had exchange of words with his wife Kamal and accused took kitchen knife and though he rushed to rescue Kamal, he was pushed by the accused and then accused stabbed Kamal on the right side of her neck. Mr. Jamdar, however, could not bring this case under any of the exceptions laid down in Section 300 of IPC though he contended that it is a case of one blow and it was not an intentional assault but only knowledge could be attributed. It is wrong to argue that the case of murder would be culpable homicide not amounting to murder only because the intention cannot be attributed to the accused. Firstly, because of the weapon used on the vital part of the body like neck used with such a force that artery and vein were cut resulting in

profused bleeding of Kamal, it cannot be said that he had no intention to kill her. His intention can be inferred from the manner and the part of the body where the blow was given with knife. Secondly, in order to attract the punishment under Section 304 of IPC, it has to be brought under any of the exceptions laid down under Section 300 of IPC. The assault pursuant to mere exchange of words cannot bring the case under any of the exceptions in Section 300 of IPC. In order to bring the case under exception what is required to be proved is that assault was not only without premeditation but in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. In this case there was no fight at all, nor a quarrel, and the accused certainly had taken undue advantage and acted in a cruel and unusual manner by picking up a kitchen knife and stabbing on the vital part of the body and cutting artery and vein by sliting neck of his wife. There is nothing brought on record on behalf of the accused as to what was the talk or quarrel about and what were the words used by the wife which had provoked the accused to resort to slit her neck. In the circumstances, we have no hesitation in confirming the order of conviction and sentence recorded against the

appellant by the trial court.

30. In the result, we confirm the order of conviction and sentence recorded by the II Additional Sessions Judge, Pune against the appellant on 22/9/1994 in Sessions Case No.119 of 1994 and dismiss the appeal.

31. On the oral application of Mr. Jamdar, two weeks' time is granted to the appellant to surrender to his bail. Thereafter he shall be liable to be taken into custody.

32. We cannot leave this matter without expressing our anguish and concern on the conduct of PW 4 Dr. Rajesh Gitakant Walvekar who was at the relevant time attached to K.E.M. Hospital, Pune. From what we have observed in the course of the judgment, it is quite clear that this young doctor went out of his way to favour the accused and, therefore, seems to have subsequently created false record to show that the patient herself had given history of accidental injury suffered by her due to nail due to fall while putting on bulb at around 9 p.m. The trial judge himself ought to have noticed this as he had an advantage of seeing the original register. But from the two

separate sheets of papers produced on record being the extracts from the original register bearing page nos.5 and 8 it is obvious that this doctor had subsequently tampered with the record with a view to favour and oblige the accused, which does not behove a person from medical profession which is a Nobel profession. It is necessary that the copy of this judgment along with the relevant record be sent to the Medical Council of Maharashtra and to the Director of Health for their information and taking necessary action against P.W.4 Dr. Rajesh Gitakant Walvekar.

. The Registry of this court is directed to send copies of the Judgment to the aforesaid two authorities immediately.

(S.S. Parkas, J.)

(S.R. Sathe,J.)